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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 21

PURPLE COMMUNICATIONS, Employer, and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party/Petitioner.	No. 21-CA-095151; 21-RC-091531; 21-RC-091584 **CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS**

TABLE OF CONTENTS

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TABLE OF CONTENTS (cont'd)

WEINBERG, ROGER & ROSENFELD
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TABLE OF AUTHORITIES

WEINBERG, ROGER & ROSENFELD
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TABLE OF AUTHORITIES (cont'd)

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TABLE OF AUTHORITIES (cont'd)

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I. INTRODUCTION

The Board's Decision in *Purple Communications, Inc*., 361 NLRB No 126 (2014), is a start. Now, the Board must resolve issues which it failed to address. The Board's presumption "that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time" (Slip Op. p. 14) is too narrow and does not resolve many issues presented by the almost ubiquitous use of electronic communications systems in the workplace.

We first list below the issues which are now presented in this case after remand to the Administrative Law Judge. We then proceed to address the factual circumstances revealed in this record and the findings of the ALJ. We apply the record and those findings to the issues.[1]

Although the Board did not address or specifically avoid these issues, they are now squarely in front of the agency. They will have to be addressed now and in future cases.

II. THE ISSUES PRESENTED

1. Whether Purple's electronic communications policy violates the Act because it prohibits use of email during work time for Section 7-protected activity where employees have time during such work time when they are not performing any productive work and no interference with such productivity occurs?

2. Whether Purple's electronic communications policy, which prohibits "sending of uninvited email of a personal nature," is overbroad because it could be reasonably understood to prohibit the sending of Section 7-protected email?

3. Whether Purple's electronic communications policy, which prohibits use of all electronic "equipment and access [to] … business purposes only," is overbroad because this could reasonably be understood to prohibit the sending or receiving Section 7-protected communications?

4. Whether Purple's electronic communications policy, which applies to all electronic communications systems, including "Computers, laptops, internet access, voicemail,

[1] We will refer to the employer as "Purple." Where we refer to the Board's Decision, we refer to "*Purple Communications I*." Where relevant, we will cite the Board's earlier severed Decision as "*Purple Communications II*." See 361 NLRB No. 43 (2014).

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electronic mail (email), Blackberry, cellular telephones," is overbroad because this could reasonably be understood to prohibit the sending or receiving Section 7-protected communications?

5. Whether the Board should expressly overrule *Register-Guard*, 351 NLRB 1110 (2007), to the extent that it allows Purple's electronic communications policy to prohibit communications with "organizations or persons with no professional or business affiliation with the Company," which prohibition would include Section 7-protected communications?

6. Whether the Board's Decision in *Lutheran-Heritage Village-Livonia*, 343 NLRB 646 (2004), should be overruled to find that employer rules that can be understood by any employees as prohibiting Section 7-protected communications are violative of the Act?

7. Whether the remedy recommended by the ALJ, which did not require rescission of the unlawful portion of the Electronic Communications Policy at all of Purple's facilities and did not require posting of an appropriate remedial notice at all of Purple's facilities, is adequate?

8. Whether the remedy recommended by the ALJ is adequate in other regards?

9. Whether the ALJ erred by closing the record without any further evidence and refusing to allow the Charging Party to make an additional record concerning Purple's electronic communications policy and the scope of any remedy?

The ALJ made a fundamental finding which we will explore in this Brief. Although accurate, it does not go far enough:

> The Respondent a.0ssigns an individual email account to each interpreter and the interpreters are able to access these accounts from the workstation computers as well as from their home computers and personal smart phones. Employees use the company email system on a daily basis while at work for communications among themselves. The company email is also use for communications among managers and employees.
> ALJD p. 3: 16-20

There are three different phrases used to qualify communications: (1) Personal; (2) business or non-business (3) work or non-work related. In all cases, Section 7-protected communications are work and business related. Such communications are protected only if they relate to "wages, hours and other conditions" of employment and concern union activity or

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concern "mutual aid or protection." In this Brief, we want to make it clear that such communications, whether characterized as "personal" or "non-work" or "non-business" related, are protected and are always related to work.[2]

In this brief, we will emphasize the use of the email system during work time.[3] This will, in our view, prove our point that these employees have routine access to the email during work time and may use it for protected concerted activity or Union related matters during work time, provided the employer is unable to demonstrate any substantial business justification to prohibit use at the time it is in use by the video relay interpreter. We will highlight those facts below. See, in particular, Part II C. We believe that the record will show that the employer allows use of the email system during all times when the employees are at the worksite, both work time and non-work time.[4] Thus, there are no special circumstances or justification to limit the use of the email during work or non-work time on this record.[5]

Finally, although we focus on email, we will argue that Purple's electronic communications policy is unlawful since it applies to other forms of electronic communications systems.

As to the remedy, it is inadequate. We explain among other things why the ALJ erred by refusing to order Purple to rescind the unlawful portions of the Electronic Communications Policy handbook provision at all of its facilities nationwide and by refusing to order the posting of an appropriate remedial notice at all of Purple's facilities nationwide.

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[2] As discussed below, we acknowledge that an employer may implement an electronic communications policy that limits such communications systems to specific business during work hours uses so long as such rules are not discriminatorily enforced.

[3] We use the traditional definition of work time used by the Board in *Purple Communications I* to exclude before and after work, lunch and rest breaks.

[4] The Board has already found that VIs have 10 minutes per hour when they don't have to be interpreting that is work time for which they are paid. *Purple Communications I*, Slip Op. p 65. This is work time during which VIs are free to use the internet or intranet for email purposes.

[5] The ALJ need not reach the question of whether the employer could limit the use of email in all circumstances when the VI is interpreting with a client. The employer has not asserted this as a special circumstance, and it has not occurred on this record.

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III. THE ELECTRONIC COMMUNICATIONS SYSTEMS AVAILABLE TO VIDEO INTERPRETERS AND THEIR USE BY PURPLE EMPLOYEES

Purple is involved in a specialized portion of the communications industry. It facilitates communication between the deaf and hard of hearing and others through Video Relay Interpreted Services. The Federal Communications Commission finances and controls this program, known as the Telecommunications Relay Service ("TRS"). It describes VRS as follows:

> VRS, like other forms of TRS, allows persons who are deaf or hard-of-hearing to communicate through the telephone system with hearing persons. The VRS caller, using a television or a computer with a video camera device and a broadband (high speed) Internet connection, contacts a VRS CA, who is a qualified sign language interpreter. They communicate with each other in sign language through a video link. The VRS CA then places a telephone call to the party the VRS user wishes to call. The VRS CA relays the conversation back and forth between the parties -- in sign language with the VRS user, and by voice with the called party. No typing or text is involved. A voice telephone user can also initiate a VRS call by calling a VRS center, usually through a toll-free number.
>
> The VRS CA can be reached through the VRS provider's Internet site, or through video equipment attached to a television. Currently, around ten providers offer VRS. Like all TRS calls, VRS is free to the caller. VRS providers are compensated for their costs from the Interstate TRS Fund, which the Federal Communications Commission (FCC) oversees.

(http://www.fcc.gov/guides/video-relay-services.)[6]

The question before the Board involves the right of employees to communicate using electronic communications systems, including email. Under the National Labor Relations Act, Purple should be required to allow its employees to communicate among themselves or with others regarding wages, hours and working conditions using the employer's email communications systems, subject only to specific limits discussed below. The Board should find that employees have the right to use email during work time for communication about working conditions. Because they have that right during working hours, they should have that right during

[6] This service is one form of the services offered by Telecommunications Relay Service, which assists persons with hearing or speech disabilities to communicate. (See http://www.fcc.gov/encyclopedia/telecommunications-relay-services-trs.) These services are all part of a broad effort by the FCC to provide communications services to various disability communities. Text-to-Voice, Speech-to-Speech and Voice Carry Over are examples of these services.

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non-work time.

IV. PURPLE'S OPERATIONS

As described by the FCC website and Purple's website, VRS provides interpretive services using American Sign Language for customers who have hearing impairments (either hard of hearing or deaf). Purple's services are displayed on its website. https://www.purple.us/contactus?mID=68. See also Slip Op. p 2.

A. THE NATURE OF PURPLE'S VRS SERVICES

Purple operates call centers, which are open 24 hours a day, 7 days a week, 365 days a year (Tr. 250), as required by the FCC rules. Purple operates sixteen call centers (Tr. 250), although it makes no difference where they are physically located because of the requirement that the calls be routed in the order they are received. The video interpreters (VIs) in the two centers involved, Corona and Long Beach, work in shifts; so, although there are 42 (Long Beach) or 31 (Corona) employees, a small percentage of them work at any time in order for Purple to maintain enough shifts to operate the centers 24/7.

The client uses a 10 digit phone number and calls in to access those services. Under the FCC rules, the calls must be handled in the order in which they are received, and Purple must respond within 120 seconds of receiving the call. Purple has implemented a Queue system so it can monitor when the calls are backing up past the 120 seconds mandate imposed by the FCC. (Tr. 154.)

The client is seen on a video screen, and the client must have similar video screen capability.[7] Clients and Purple have proprietary equipment and software used to process the calls. (Tr. 46.) All of this is done on the Internet through high speed lines. VIs who work for Purple are certified according to industry standards established by a national organization of such interpreters. (http://www.rid.org/. Tr. 270-71.) The hearing impaired are equally well-organized and have their own advocacy organizations. (http://www.nad.org/.)

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[7] The service is detailed on Purple's website: https://www.purple.us/usernotice.

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B. THE THREE DIFFERENT TYPES OF COMMUNICATION SYSTEMS USED BY THE INTERPRETERS

Each VI is provided an email address, [xxx]@purple.us. (Tr. 26, 47.) Interpreters use the email every day. (Tr. 48, 129.) Clients must provide an email address to use Purple's services. https://www.purple.us/register/default.aspx.

There are three different computer terminals used by the VIs: (1) computers at their workstations, (2) a computer maintained in a central portion of the office, known as the Queue computer, and (3) a terminal in the lunch or break rooms. The email communication systems made available by Purple to its VIs in each of those settings are as follows:

Workstation: There is limited internet access, and it is used only for the purposes of signing on by the VIs. VIs have access to Purple's Intranet at their workstations. (Tr. 25.) In addition, Purple concedes in its Brief that VIs have access to email "at each workstation", Brief p. 4, and we accept this statement. The ALJ found that email is available at the workstations. ALJD p 3 ("interpreters are able to access these [email] accounts from the work station computers as well as from their home computers and personal smart phones."). VIs have a phone connection to use to talk to third parties with whom the communication is made for the hearing impaired client. The VIs use the computer to connect with the video screen at the client's location. VIs also have games available that are already loaded into the computer system. (Tr. 46.)

Queue: This is a computer located in the center part of the office. This computer has Internet Explorer access to the internet. AOL Messenger is constantly on, and this computer is generally used for communicating operations through AOL Messenger. The interpreters all have access to Internet Explorer on this terminal.[8]

The Break Room: In each of the centers (Tr. 27, 50), there is a computer available to the employees in the break room to which there is Internet access. The company intranet is available as well as other programs, such as Microsoft Word. (Tr. 27.)

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[8] In the record the transcript refers to "cue", "ceue" but not "queue." All parties agree it is a "queue" computer reflecting the fact that all calls are but into a "queue" for answering in the order in which they are received

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Personal Computers or Cell Phones: VIs can access their email from their personal PDAs or other devices. (Tr. 10, 204-05 and 210.)

C. THE USE OF PURPLE'S COMMUNICATIONS EQUIPMENT.

1. **Email**. The email system, which is available to all the employees, has been used by employees to communicate on issues of working conditions. (Tr. 64.) Managers will often respond to employee emails on the weekend. (Tr. 141.) The VIs have access to their emails on their personal devices and use it anytime, 24/7. (Tr. 204-05 and 210.) VIs have access to email "at each workstation", Purple Brief p. 4 and ALJD p 3. Management similarly uses the email during non-work hours. (Tr. 204-206, 211.) VIs used email during the campaign to circulate an anti-organization petition. (Tr. 71.) VIs advised management of the petition and asked management to stop its circulation. (Tr. 76-79 and 192.) One manager responded to the inquiry regarding the petition. (Tr. 193.) As noted, the employees have access to the company email from their personal devices and have used it. (Tr. 10 and 211.)

Purple uses the email system to send memos to the interpreters regarding working condition issues. (Tr. 132. See also, Emp. Ex. 10 [key metric adjustment memo to all video interpreters] and Ch. P. Ex. 7 [announcing bonus].) Purple also has a newsletter which it sends through the company email to the employees. (Tr. 238.) The President of the company testified that the email was used during the representation election campaign. (Tr. 303–04.) The Hostess bankruptcy was the subject of "commuique" among VIs and management. (Tr. 272.) When describing communications between employees, it is apparent that when the word "talk" is used, Purple is referring to the use of the email. (Tr. 207.)

Purple, in order to encourage communications, has an open door policy. (Jt. Ex. 1 at p. 29.) Because the headquarters are located in a remote location in Rocklin, California, it is apparent that these open door communications are encouraged to be accessed by email since employees can't communicate with the President or the Human Relations Department except by email or by phone.

During the election campaign, Purple admitted the lack of communication and the necessity of communication among the employees. Employer CEO John Ferron used the term

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"communication" repeatedly in captive audience meetings. He complained repeatedly about the lack of communication and said that Purple would encourage more communication in an effort to improve the workplace. (Tr. 273, 278.) The Board made these findings in *Purple Communications, Inc.*, 361 NLRB No. 43 2014), slip op. at p. 3, in ordering new elections at the two sites.

2. **Internet**. VIs have unlimited access to the internet in the break room and the Queue computer.

3. **Intranet**. Human Resources material is available on the intranet. It is available at the workstations and in the break room. (Tr. 25 and 27.)

4. **Social Media**. Purple also relies on various social media services. There is no limitation on employee access to such sites at any time.

5. **Phone**. The company rules allow limited personal use of the phone up to three minutes a call. (See Employee Handbook, Jt. Ex. 1 at p. 29 [prohibiting making or accepting personal telephone calls, including cell phone calls, of more than three minutes in duration during working hours, except in cases of emergency].) This policy does not prohibit employees from using their cell phones, including, presumably, emails or text messaging. Similarly, if an employee is hearing impaired, the employee is specifically permitted to use "relay" in the "normal course of your business" to make that "personal" call. (Jt. Ex. 1 at p. 33.)

6. Purple offered no evidence that the use by employees of its electronic communications systems offers any special risk. The ALJ specifically found as follows:

> "In reaching the conclusion that Respondent's policy violated the Act, I considered the testimony of Monette and Ferron, who summarily listed reasons for portions of the electronic communications policy. However, the Respondent does not assert that any of tho0se concerns rise to the level of special circumstances necessary to maintain production or discipline, nor has it demonstrated that the stated concerns justify the email restrictions. To the contrary, as discussed above, the Respondent has stated that it does not contend that special circumstances exist to justify the restrictions.

ALD p 5.

Purple did not take Exception to this important finding.

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D. PURPLE'S ELECTRONIC COMMUNICATIONS POLICY APPLIES TO ALL OF THESE SYSTEMS:

The policy is as follows:

INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY

> "Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment [which] is provided and maintained by the [sic] Purple to facilitate Company business. All information stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.
>
> Prohibited activities:
>
> "Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other company equipment in connection with any of the following activities…"
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.
>
> 5. Sending uninvited email of a personal nature.

(*Purple Communications I,* Slip Op. p. 2–3.)

E. THE USE OF EMAIL FOR WORK RELATED PURPOSES INCLUDING USE BY ANTI-UNION EMPLOYEES FOR SECTION 7-PROTECTED WORK RELATED ACTIVITIES

As noted above, the ALJ found that employees and Purple use email during work time for work related communications. However, there is very specific conduct which supports this. The Board should acknowledge clear evidence in the record that Purple tolerated use of company email by anti-union employees for Section 7-protected activity."

In particular, the Board should now make factual findings regarding Respondent Exhibit 8, which contains messages sent to and from Purple Communications employees using company e-mail to seek support for an anti-union statement.[9] (See Resp. Ex. 8, unnumbered p. 4 [e-mail from marie.treacy@purple.us to renee.souleret@purple.us]; unnumbered p. 7 [e-mail from mary.dettorre@purple.us to renee.souleret@purple.us].) The employees presented this statement

[9] The ALJ failed to specifically reference these emails however they are included in his general finding of email use.

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with its attached emails to Purple Communications (Resp. Ex. 8, unmarked p. 1 [cover letter addressing statement to company representatives]; Tr. 135-37), so Purple Communications was aware of this use of its email system by its employees for the work related and Section 7-protected purpose of soliciting opposition to the union.[10] In fact, Purple introduced copies of these e-mails as an exhibit in the hearing in this case.

The email exchange represented in. Resp. Ex. 8 and 4, consisting of numerous emails between employees, was sent, in many instances, during the day, presumably during working hours.[11]

Most evident is the email from Judith Kroger, a Union supporter, to her manager, complaining about the anti-union activity during work time. (See Resp. Ex. 4 [email dated November 14, 2012].) Her supervisor responded later that day, and Ms. Kroger immediately thanked him. *Id*. Ms. Kroger testified that she sent that email during work time to complain about the activity going on at the worksite. (Tr.191-92.) This was an evident use of the email for work related purposes which illustrates our point about the use of email by employees during work hours with apparent approval by management.[12]

The same use of the email was made by Mr. LoParo. He emailed his supervisor, who responded about anti-union activity. This activity was found by the ALJ and undisturbed by the Board. (*Purple Communications I*, Slip Op. p. 65 [ALJ Decision]; Tr. 76–82.)

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[10] This is important because the Board mistakenly stated in its decision that "[t]he record is sparse regarding the extent to which the interpreters have used the Respondent's email for nonbusiness purposes," (*Purple Communications I*, 361 NLRB No. 126, at Slip Op. p. 3) and, in particular, appears unaware of the clear record evidence of Purple Communications permitting employee use of its email system to solicit opposition to the union. The Board made this comment although the ALJ did note the use by VIs of email during work times for both soliciting opposition to the Union and addressing this conduct to management. (*Purple Communications I*, Slip Op. p. 64–65 [ALJ Decision] [describing use of email by employees].) This mistaken impression of the record evidence is based on the fact that the ALJ did not address employee nonbusiness use of company email, resolving the *Register-Guard*, 351 NLRB 1110 (2007), issue in his original decision.

[11] We don't know whether the VIs were on work time, but it is clear this is during working hours during the day (10:13 a.m; 3:18 p.m.; 10:34 a.m.; 10:38 a.m.; 8:04 a.m.; 7:33 a.m.; 8:20 a.m., 8:21 a.m. and 3:41 p.m.). Mr. LoParo and Ms. Kroger both testified that their emails were sent from work during working hours.

[12] The ALJ described this in some detail. (*Purple Communications I*, Slip Op. p. 64 [ALJ Decision].)

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In addition, the Board should find, based on the existing record, that employee business[13] use of company email was routine and tolerated by Purple Communications. In addition to Respondent Exhibits 8 and 4, the record contains evidence, as the ALJ previously found, that "[e]mployees routinely use the work e-mail system to communicate with each other." (, Slip Op. p. 62 [ALJ Decision]. See also Tr. 26, 47.) In addition, "interpreters can access [their company email] accounts . . . from their home computers and smart phones" as well as from "shared computers that are located in common areas" where employees take breaks. (*Ibid*. See also Tr. 27, 49-50, 211.) Finally, the company provided no evidence of any employee ever being disciplined for violating its electronic communications policy. (Tr. 309–10.) On the basis of these three undisputed facts — routine employee use of company email to communicate with one another, unlimited employee access to company email on non-work time including in break rooms and from home and work time, and the fact that no employee was ever disciplined for nonbusiness use of company email — the Board should draw the reasonable inference that employee work related use of Purple Communications' email system to communicate about wages, hours and other conditions of employment was routine and tolerated by the company.

F. THE RULE THAT IS BEFORE THE BOARD

The Board must evaluate the following rule in light of the context in which the interpreters work.

The rule that is at issue states:

INTERNET, INTRANET, VOICEMAIL, AND ELECTRONIC COMMUNICATIONS POLICY

> Employees are strictly prohibited from using the computer, internet, voicemail and email systems and other Company equipment in connection with any of the following activities:

[13] "Business" means work related in some circumstances. Business, in this context, includes the anti-union emails as well as the email from one worker questioning the anti-union emails. All of these were work related and certainly were activity for "mutual aid or protection." To be clear, they also were not "personal," in the sense that they were unrelated to work or business issues, such as emails about soccer, church or social events. As noted above, Purple explicitly allows use of phones for personal purposes. The rule at issues does not allow "uninvited email of a personal nature," so, presumably, it allows invited emails, meaning email exchanges of a personal nature.

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2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the company.

5. Sending uninvited email of a personal nature.

(Jt. Ex. 1 at p. 30–31.)

G. PURPLE'S BUSINESS MODEL CREATES PERIODS OF TIME WHEN VIDEO INTERPRETERS ARE NOT ENGAGED IN PRODUCTION, WHICH IS RESPONDING TO CALLS AND INTERPRETING USING PURPLE'S COMMUNICATION SYSTEMS.

VIs have periods of time during the work day when they are not engaged in "production," meaning answering calls from clients and interpreting for them using the communications services. In order for the Board to properly evaluate the availability and use of email in this workplace, we describe this below.

VIs process calls during a period that is somewhat less than 100% of their "work time." VIs are expected to be logged in only 80% of their time for core hours and 85% for non-core hours. (Tr. 85-86.) Log-in means that the VI is "to be sitting in your chair, logged into the system waiting for calls to come in." (Tr. 86.) The VI has to be processing calls only 55% of the shift. This is billable time for which the FCC is billed by the minute, so the more processing time, the more Purple is reimbursed. The processing time is the critical metric for reimbursement and the business model. (Tr. 42, 85, 86.) These metrics had increased before the organizing and then changed again just before the election. (Tr., 85-88.) Purple implemented a "High Traffic Fail Safe" (Em. Ex. 9), which reduced the expected log-in time when utilization met high traffic conditions. Even under these metrics, VIs were expected to be interpreting 55% of the shift (132 minutes out of 240 minutes), which would be reduced during the remainder of the 8 hour shift to 46% (122 minutes out of 240 minutes).

It is apparent that between the log-in time and the actual processing time, there are periods of time "in between calls." (Tr. 107 and 172.) There is no evidence in the record that their activities are restricted when they are logged-in but not on a call. Presumably, when they start the call by reaching out to the client, they must be at the work station using the computer and be prepared to complete the phone hook up. There is no evidence of any limitation on activities during this non-productive time.

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This work schedule means that VIs are actively working, that means interpreting, for approximately 50% of the time that they are in the facility. For approximately 15% to 20% of the time, they are not actually logged in and thus have no responsibility for video interpreting.

The VIs are entitled to a 10 minute break every four hours, as provided for by Purple policy. (Jt. Ex 1, p 21.) During this break period, they are paid and do not have to log out of their computers. (Tr. 74.)[14] In California, this is also state law. (*See* IWC Order 4, Section 11.) Under California law, the employee is not forced to take a break, it must be available.

Employees are also entitled to a 30 to 60 minute meal period during which they are relieved of all duty. (Jt. Ex 1, p 21.) The VIs log out, and they are not paid for that time. In California, this is also state law. (*Id*. at p. 21. Cal. Lab. Code Section 512; IWC Order 4, Section 12.)

The amount of actual interpreting time, processing time and log-in in time are limited because of ergonomic concerns. (Tr. 253, 298.) Purple expects each of the VIs to take a 10 minute break each hour from interpreting with clients. (Tr. 75.) Presumably this is "free time" when they can read, talk with other VIs or engage in non-interpreting activity not involving the use of the interpreting communication equipment.

Finally, in order to encourage VIs to work more efficiently, the company maintains a bonus system that is based upon the amount of processing time. (Tr. 161.)

Although work time is defined from when the VI logs in until when the VI logs out, the business model is designed to permit a portion of time in several blocks and/or each hour when the VIs are not actively working. They are paid for this time but are free to leave their workstations or remain at their work stations and are free to engage in communications with other interpreters or managers or use their email, the phones[15] or the internet. They are free to go to the break rooms. The company maintains a minimum standard processing time that allows some remaining time that is paid and that is work time but which does not require interpreting.

[14] The Board has already found that VIs have 10 minutes per hour when they don't have to be interpreting but which is work time for which they are paid. (*Purple Communications I*, Slip Op. p 65.) This is work time during which VIs are free to use the internet or intranet for email purposes. State law requires such paid breaks. Industrial Welfare Commission Order No. 4.

[15] Purple's phone rule allows personal calls up to three minutes. (Jt. Ex. 1, p. 28–29.)

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The ALJ's finding to which Purple has not taken Exception supports this:

> Employees use the company email system on a daily basis while at work for communications among themselves. The company email is also use for communications among managers and employees. ALJD p. 3: 16-20

Thus the use of email by VIs during work time is common. The use of the email for work related issues and thus protected communications is sanctioned by the use of the email by employees.

There are workplaces where this is common. Truck drivers wait for a dispatch. Machine operators wait while material is delivered. Assembly line workers wait for the next batch of product. There are times during any work time when employees are not engaged in direct production. They are free to talk and communicate, or they can just wait. It is work time and compensable.

V. ARGUMENT

A. ELECTRONIC COMMUNICATIONS SYSTEMS MAINTAINED BY PURPLE SHOULD BE AVAILABLE TO EMPLOYEES TO COMMUNICATE FOR PROTECTED CONCERTED ACTIVITY AND UNION ACTIVITY.

In summary, where an employer such as Purple generally allows employees access to an email system, the law should create a presumption that such access allows for communication of matters relating to working conditions, including relating to efforts to form, join or assist a labor organization or for mutual aid and protection within the meaning of Section 7. Such a presumption could be rebutted by an employer who expressly limits the email system *during work time* to specific and defined business uses or limits and demonstrates that it strictly enforces such a rule. However, the employer could not impose such a limit during non-work time. Where such business uses include matters of wages, hours or working conditions, employees may use such communication systems for communications relating to working conditions during work hours.[16] We believe this is a practical approach that accommodates employer interests and the Section 7 rights of employees under the Act. We believe the Board's Decision in *Purple* does

[16] One variant of the restriction would be an email system on an intranet where the employees would receive emails and not have access to sending emails. In those cases, the employer would not have opened up the email system to general use.

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this implicitly. *Purple*, however, makes it clear that an employer's interests are accommodated by allowing employees to use the electronic communications systems during non-work time unless the employer can establish special circumstances.

As a corollary, where the employer, such as Purple, allows any personal use of the email, meaning non-work related[17] use, the employees may use the email for communication about efforts to form, join or assist a labor organization or for mutual aid or protection. Here, Purple does this by creating a presumption that, during all non-work time, the employee may use the electronic systems without restriction for protected concerted activity or union activity. Here, Purple additionally does this by prohibiting only "uninvited email of a personal nature." (Jt. Ex. 1 p. 30–31.) By allowing personal email, which is unrelated to work at all times (work and non-work times), it has no justification to limit email about work place issues.[18]

Although this case focuses on email, this rule should apply generally to employer electronic communication systems.[19] There is some difference between access through a company provided computer terminal at work and employee provided electronic device, either of which can access email or other communication systems. The principles of access and use that Section 7 seeks to protect are, however, the same. We address concerns attempting to encompass the broad array of such systems.

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[17] We use the term "work related" rather than "business related." The term business is ambiguous since employees could reasonably interpret "business related" to exclude communications about wages, hours and working conditions. The Board uses the term "work" in other contexts, and it follows the statutory language that recognizes "work" and "working." 29 U.S.C. sections 142(2), 143, 151, 152(3), 152(12), 158(b)(4)(D), 158(g). "Work" thus encompasses both business issues that may not relate to wages, hours and other conditions of employment as well as those that do. Of course, if the employer prohibits any communications specifically about working conditions, that would not be permissible. We point out that the term "business," as used by Purple, suffers from this ambiguity. It is thus overbroad. .

[18] The ALJ so found here: "Employees use the company email system on a daily basis while at work for communications among themselves. The company email is also use for communications among managers and employees." ALJD p. 3: 16-20.

[19] This rule would not apply to physical communications systems, such as bulletin boards or fax machines. It would apply to a fax program that allowed employees to fax a document from the computer directly just as the employee could send an email attachment directly.

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B. WELL-SETTLED PRINCIPLES GOVERN THE RIGHTS OF EMPLOYEES TO COMMUNICATE IN THE WORKPLACE.

Well-settled National Labor Relations Act principles regarding employee workplace communications entail the following conclusions regarding employee communications *via* email: *First*, where employees are allowed to communicate with one another about non-work related matters, meaning personal matters, through a company's email system, employees have an NLRA-protected right to use the email system to communicate with one another about union or other matters of mutual aid or protection so long as the communication is concerted. *Second*, the employer may restrict such email, if the email constitutes solicitation, to non-working time, and it may impose additional restrictions on such communications only if the restriction is justified by a showing that it is necessary to further substantial managerial interests. *Third*, in no event can an employer take adverse action against an employee, nor limit such communication, based on the ground that the employee's email communications concerned union or other concerted, protected matters related to mutual aid or protection. All of this was recognized in *Purple Communication I.*

The NLRA principles regarding the right of employees to communicate with one another at their workplace regarding union and other matters of mutual aid and protection were summarized and explained by the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

Beth Israel described the basic analytical framework for determining whether employer restrictions on employees' workplace communications constitute unlawful interference with the exercise of Section 7 rights:

> [T]he right of employees to self-organize and bargain collectively established by § 7 of the NLRA, 29 U.S.C. § 157, necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), articulated the broad legal principle which must govern the Board's enforcement of this right in the myriad factual situations in which it is sought to be exercised:
>
> > "[The Board must adjust] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not

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> unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." *Id*., at 797-798.

That principle was further developed in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), where the Court stated:

> "Accommodation between [employee-organization rights and employer-property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id*., at 112.

(*Beth Israel Hospital*, 437 U.S. at 491-492 [footnote omitted].)

Eastex, in turn, explained that, since "employees are already rightfully on the employer's property, . . . it is the employer's management interests rather than its property interests that primarily are implicated" by employee workplace communications. (*Eastex*, 437 U.S. at 573 [quotation marks, citation and brackets omitted].) It follows that, to justify the suppression of such communications, an employer must "show that its management interests would be prejudiced" to a sufficient degree to justify the suppression. (*Ibid*.)

In sum, under the NLRA, "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." (*NLRB v. Babcock & Wilcox Co.*, *supra* at 113 (1956).)

The Board recognized and applied these principles in *Purple Communications I*.

We recognize, further, that an employer may limit use of the email to strictly defined business related purposes *during work time* where it establishes such a clear rule and strictly enforces the rule. This accommodation recognizes that there may be managerial reasons to limit communications *during work time*. For example, in the hospital setting, discussions in front of patients or in patient care areas may be limited. An employer could limit email use only to communications with customers or for a specific purpose such as checking on the status of orders. Similarly, in a retail setting, discussion can be limited on the sales floor in front of customers. VIs cannot be communicating with others while interpreting in front of clients on the video screen. A communication system could be implemented which permits only one-way communication, such as managers to employees, but not reverse or between employees. But, like

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every such substantial managerial interest, it must be narrowly applied and subject to a substantial managerial interest. We submit that any employer who wants to implement and enforce such a rule should carry the burden of establishing that it promulgated such a clear rule and enforced it. Proof of enforcement falls upon the party that has access to the records to prove this. The employer can retain emails for a reasonable period of time and will likely do so in a context where it has such a managerial interest. Employees are not likely to save all emails, and employers do so as matter of course. Finally, we think this is practical. When employees communicate about work related issues, they often mix in personal matters. We just don't think, and neither will the Board agree, that it is likely that any employer that allows email use will strictly enforce any rule against any communication on all non-work related matters. But with respect to oral communications by phone, in person, Skype, 2-way radio or any other system, personal remarks and communications, either standing alone or in conjunction with work related communications, are the rule and the accepted norm for workplace communications. Purple does not so limit the use, and this perfectly illustrates the point.

C. THESE PRINCIPLES APPLIED IN THE EMAIL AND COMMUNICATION SYSTEM CONTEXT

To put the foregoing general principles into the email and communications context: Where an employer such as Purple allows employees to use the company's email system to communicate with each other on workplace matters generally (and this applies where they are allowed to communicate on personal matters unrelated to workplace issues), the "employees are already rightfully on the employer's property" in the sense of having been allowed access to the email system. (*Eastex*, 437 U.S. at 573.) And, "[e]ven if the mere distribution by employees of [email messages] protected by § 7 can be said to intrude on [the employer's] property rights in any meaningful sense, the degree of intrusion does not vary with the content of the [email]." (*Ibid.*) Thus, "it is the employer's management interests rather than its property interests that primarily are implicated" in the choice of work matters about which employees may communicate *via* email. (*Ibid.*) Members Miscimarra and Johnson effectively recognized this.

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In such workplaces, a rule prohibiting employees from using email to communicate with each other about union or other matters of mutual aid or protection is most certainly a "restriction . . . on the employees' right to discuss self-organization among themselves." (*Babcock & Wilcox*, 351 U.S. at 113.) Such a rule violates § 8(a)(1)'s proscription of employer "interfere[nce] with . . . the exercise of rights guaranteed in 7 of that Act [29 U.S.C. § 158(a)(1)] . . . unless the employer can demonstrate that a restriction is *necessary* to maintain production or discipline." (*Babcock & Wilcox*, 351 U.S. at 109 and 113 [emphasis added].)

D. EMPLOYERS MAY IMPLEMENT SPECIFIC RULES LIMITING EMAIL USE DURING WORK TIME TO DEFINED BUSINESS PURPOSES IF THEY STRICTLY ENFORCE THOSE RULES; EMPLOYERS MAY IMPLEMENT NON-DISCRIMINATORY RULES LIMITING SOLICITATION DURING WORK TIME.

This is not to say that employees are always entitled to use their employers' electronic communications systems for Section 7-protected communications, nor does it mean that employers are prohibited from maintaining reasonable non-discriminatory rules regarding employee use of company electronic communications systems.

Where an employer *altogether* denies employees the right to use a company electronic communications system for any communications, employees have no right to use that system for Section 7-protected communications relating to wages, hours and conditions of employment. Purple, as the Board recognized, does not altogether deny employees the right to use the electronic communications system. (Slip Op. p 3.) Where access is granted only for strictly defined purposes which are non-discriminatory, employees may under *Purple Communications I*, use the electronic communications system during non-work time for Section 7 protected communication.

Just as an employer is not required to provide employees with access to its email system at all, if an employer maintains and strictly enforces a rule limiting use of the email to a specific business purpose (such as contacting customers, forwarding medical records or other business records or dispatchers or schedulers), it need not permit employees to use that system for Section 7-related communications during work time. In contrast, as we have explained, once an employer creates an "avenue[] of communication open to [employees] . . . for the interchange of ideas"

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(*LeTourneau*, 54 NLRB at 1260) by permitting employees to use its email system for communications, it may not deny employees the right to use that system for Section 7-protected communications as well. Of course, where the communications system is open to use for personal purposes unrelated to work,[20] the employer cannot limit the nature of the communication if concerning issues of wages, hours and conditions of employment for mutual aid or protection. Purple does not so limit the use of email by VIs. Moreover, the employer declined to present any evidence of such limitations.

The rationale for this sensible rule is that, pursuant to the logic of the Supreme Court's decision in *Eastex*, an employer may rest on its managerial interest in its email system only to decide: (1) whether to provide employees with access to its email system at all; and (2) to then exercise its managerial interests whether to permit employees to use that email system for non-work purposes. Once "employees are already rightfully on the employer's property" — by means of the employer providing employees with access to its email system and permitting non-work use of that system — "it is the employer's *management interests* rather than its property interests that primarily are implicated." (*Eastex*, 437 U.S. at 573 [quotation marks and brackets omitted] [emphasis added].)

In other words, the act of employees sending emails or using electronic communications systems regarding issues of mutual aid and protection with which the employer disagrees does not cause "an injury to the company's interest in its computers – which worked as intended and were unharmed by the communications – any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment." (*Intel Corp. v. Hamidi*, 71 P.3d 296, 300 (Cal. 2003).) Thus, as between personal emails, whose content is not protected by the NLRA, and Section 7-protected emails, "the degree of intrusion [into the employer's property rights] does not vary with the content of the material." (*Eastex*, 437 U.S. at 573.)

[20] Here we mean "purely personal," such as communications about family matters, recipes, and so on.

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E. AN EMPLOYER COULD LIMIT SOLICITATION TO NON-WORKING TIME.

Having said that much, it is also true that a general nondiscriminatory rule limiting employees' communications that are solicitations to non-work time is valid on its face and may be applied to email communications as to other communications. This follows from the fact that "[w]orking time is for work" so that "a rule prohibiting union solicitation during working hours . . . must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose." (*Republic Aviation*, 324 U.S. at 803 n.10.) By the same token, because "time outside working hours . . . is an employee's time to use as he wishes without unreasonable restraint, . . . a rule prohibiting union solicitation by an employee outside of working hours, although on company property[,] . . . must be presumed to be an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." (*Republic Aviation*, 324 U.S. at 803–04 n.10.) Thus, to justify restrictions on employee email communications concerning union or other concerted, protected matters during *non*-work time, the employer must show "special circumstances" that "make the rule necessary."[21]

Furthermore, consistent with *United Steelworkers v. NLRB (Nutone*), 357 U.S. 357 (1958), we could imagine an employer setting up a one way captive audience meeting where it did blast emails requiring employees to read but not respond directly at that time. But if employees had otherwise access to email, the principles discussed here would not prevent further communication and discussion.[22]

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[21] We recognize that, as a practical matter, an employee who sends an email containing a solicitation or a non-business related matter may not know whether the recipient is working. Relatedly, a recipient who is on work time may not be able to discern whether an email contains a solicitation or a non-business related matter without opening it. For these reasons, an employer who chooses to limit the use of company email for solicitation to non-work time or strictly limit the use of email to defined business purposes must reasonably account, in a non-discriminatory manner, for these idiosyncrasies of email communication. (See *Purple Communications I*, Slip Op. n. 72.)

[22] *Virginia Concrete Corp*., 338 NLRB 1182, 1187 (2003) (one way text messaging).

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F. AN EMPLOYER COULD IMPOSE OTHER LIMITS ON EMAIL OR ELECTRONIC COMMUNICATIONS.

An employer also could lawfully prohibit employees from sending abusive and threatening email messages on the company email system, as long as such a rule is not applied in a manner that interferes with employees' right to engage in Section 7-protected communications. "[A] rule prohibiting 'abusive language' is not unlawful on its face," rather "[t]he question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the specific facts of each case." (*Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). See (2012)*Costco Wholesale Warehouse*, 358 NLRB No. 106 at page 2 (2012).) Communications that are "malicious, abusive or unlawful" would not be protected. (*Id*., citing *Lutheran Heritage Village-Livonia* and other cases.) This general principle applies to employer rules prohibiting abusive communications in the email context.[23]

G. WHERE EMPLOYEES HAVE ACCESS TO EMAIL DURING WORK HOURS, THEY CAN BE PROHIBITED FROM ENGAGING IN SOLICITATION; THEY CANNOT BE PROHIBITED FROM WORK RELATED COMMUNICATIONS CONCERNING WORKING CONDITIONS WHERE THEY OTHERWISE HAVE ACCESS TO EMAIL.

This principle that employers can limit use of the email to specific business purposes and prohibit solicitation during working hours, must, however, recognize the equally important rule that employers cannot prohibit employees from talking about and communicating for purposes of mutual aid or protection when the email is generally available unless the email use is restricted to a business use unrelated to those issues. It is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the Act. (*Mcpc, Inc.*, 360 NLRB No. 39 (2014); (2012)*Flex Frac Logistics*, 358 NLRB No. 127 at * 1-2 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *Costco Wholesale*, 358 NLRB No. 106 at p 2-3; *Flamingo Hilton Laughlin*, 330 NLRB 287, 292 (1999); *Koronis Parts*, 324 NLRB 675, 686, 694 (1997). See also *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624-625 (1966) [wages are a "vital term and condition of employment," "probably the most critical element in employment" and "the grist on which concerted activity feeds"].).

[23] Purple maintains such rules, which are not challenged. (Jt. Ex 1, p. 30–31.)

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It is important here to distinguish between solicitation and communication.[24] The Board has historically drawn an important distinction between solicitation and mere talking. (*Conagra Foods, Inc*., 361 NLRB No. 113 (2014). See also (2011)*Fremont Medical Center*, 357 NLRB No. 158 fn. 9 (2011).) In *W. W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enforced*, 582 F.2d 1118 (7th Cir. 1978), the Board noted, "It should be clear that 'solicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad." (See *Powellton Coal Co*., 354 NLRB 419 (2009), incorporated by reference in 355 NLRB 407 (2010) [employer unlawfully prohibited employees from engaging in conversations about the union]; "An employer may not restrict union related conversations while permitting conversations relating to other topics." *Rockline Indus.*, 341 NLRB 287, 293 (2004); *Jensen Enter.*, 339 NLRB 877, 878 (2003).) Thus, an employer cannot turn a valid no-solicitation rule into a no-talking rule. (*Starbucks Corp.*, 354 NLRB 876, 891-93 (2009); *Emergency One, Inc.*, 306 NLRB 800 (1992) [respondent unlawfully restricted conversations about the union during work time while permitting other conversations including those about non-work matters]; *ITT Industries*, 331 NLRB 4 (2000) [respondent's instruction not to engage in any discussion of the union with any employee unlawful where employees were, notwithstanding rule in employee handbook prohibiting all solicitations during working time, allowed to engage in discussions and solicitation on the production floor].) In *Wal-Mart Stores*, 340 NLRB 637, 639 (2003), *enf'd in relevant part*, 400 F.3d 1093 (8th Cir. 2005), the Board found that the wearing of union insignia was not solicitation and would not justify the application of a no solicitation rule. The Board's recent Decision in *Conagra Foods, Inc., supra*, reaffirms this and applies to this case.

H. THE BOARD HAS RECOGNIZED THE USE OF EMAIL DURING WORK TIME OFTEN INVOLVES SECTION 7-PROTECTED COMMUNICATIONS.

Since the first email case in 1993, the Board has recognized that employees, once they have access to email, use it for work related purposes, including communicating issues about working conditions during working time. (*E. I. Du Pont De Nemours & Co*., 311 NLRB 893,

[24] Purple maintains an unchallenged rule prohibiting solicitation "during working time for any purpose." (Jt. Ex.1, p. 32.)

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9191 (1993).)

Thus, as long as an employer such as Purple allows any communication during work time about work related matters, it cannot prohibit such communications when they involve issues concerning the workplace, including how those conditions might be improved. Furthermore, so long as the employer uses the email system to communicate about wages, hours and working conditions or matters of mutual aid and protection, it cannot prohibit employees from doing the same.[25] And further, where any employer such as Purple allows use of email for personal purposes unrelated to working conditions, it cannot prohibit communications about work related conditions. Again, however, the employer could limit email use to defined uses relating to production. And, further, even in regard to workplace issues, it could make email available to communicate only from employer to employees. Once the employer allows general use of email among employees, it cannot prohibit use about workplace issues. Here, Purple has offered no evidence that employee communication with other employees creates any interruption of service. (Cf. *Conagra Foods, Inc.*, 361 NLRB No. 113 at * 3 (2014) **[**"Nor does a momentary interruption in work, or even a risk of interruption, subject employees to discipline for conveying such union-related information."])

Here, Purple uses email for human resources communications, and this is the norm with employers who have an intranet or email on the internet. (Tr. 64, 132. Resp. Ex. 10 [key metric adjustment memo to all video interpreters] and Ch. P. Ex 7 [announcing bonus]. See *Purple Communications*, 361 NLRB No. 63 at note 13.) Where email is used for such purposes, employees have a right to communicate with management or other employees about such issues where, again, employees are given access to use of the email. *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997), illustrates this principle from a case that arose almost 20 years ago. There, the

[25] Member Miscimarra argues that even where the employer allows some access to employees it should not allow use of such systems "for a wide range of employee-to-employee complaints about working conditions and coemployees, the coordination of boycotts or walkouts against the company and union organizing, among other things." (Slip Op. p. 22 [fn. Omitted].) As noted, an employer could implement a nondiscriminatory email system that allowed only one way communication, employer to employee. But once it allows employee to employee communication, it cannot foreclose Section 7-protected communication. Nor can it effectively foreclose communication to the employee by non-employees who have that email address except by filters or other non-discriminatory applications.

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employer used its email system to communicate with employees about changes in vacation and incentive bonus. One employee objected to the change in the vacation policy and offered a detailed criticism of the change to the employer and copied the other employees. There was no restriction imposed on employees that limited communication on the email system. When the employee wouldn't retract his criticism, he was fired. The Board applied traditional principles and found the conduct was concerted, protected and for mutual aid or protection. All of the conduct was on work time. These were not personal communications.

The Board's recent decision in *California Institute of Technology*, 360 NLRB No. 63 (2014), illustrates this. Employees used the email system to engage in a vigorous and sharp debate about a workplace issue involving privacy. The employees sent mass emails to other employees and to outsiders, apparently on work time, concerning the subject of privacy and were disciplined for their conduct. The Board had no trouble finding the conduct did not lose the protection of the Act. The Board described the testimony of the director of Human Resources:

> She aptly described these communications as being "part of the fabric of every working group in every day work operations." She continued: "[T]hat is part of, in a work group, what people inform each other about."

(*Id.* at p. 14.)

This demonstrates our point that once access is allowed to email for email communications among employees, employees are allowed to use it for purposes related to mutual aid and protection. The employer cannot then discipline employees who use it to debate workplace issues. (Resp. Ex. 8 and 4.)

This is forcefully illustrated in *Food Services of America*, 360 NLRB No. 63 (2014). The Board sustained the termination of one discriminatee because he used the company email to disclose "confidential business information." (*Id.* at n. 4.) Note that the disclosure was "confidential" information, not just business information. On the other hand, the email and instant message exchanges between discriminatee Rubio and others was protected activity. From the entire context it was clear that the employees were using company communications systems

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and company email.[26] Food Services condoned this use and only terminated Mr. Rubio when it objected to his instant messaging about job security. In summary, an employer can promulgate clear rules limiting company communications systems to specific business purposes. It can similarly limit solicitation for union or protected activity to non-work time. But once it allows access to the email system without clear, strictly enforced business related limits, it cannot prohibit communications about wages, hours and working conditions for mutual aid or protection. These were not personal emails.

The Board's Decision in *Hitachi Capital America Corp*, 361 NLRB No. 19 (2014), supports this. *Hitachi* serves as another example where an employee used the electronic communication system (email) to communicate on working conditions during work time where she had general access to that system. The email exchange was in response to the employer's implementation of a new policy concerning inclement weather to which the discriminatee objected. The employer used the email system to communicate on work related issues. The exchanges occurred during work time throughout the day of February 3, 2011, beginning at 9:15 and ending at 2:55. Other employees used the email system to comment on working conditions. Member Miscimarra notes in footnote 3 of his dissent that the discriminatee could have used the email to respond further. He furthermore concurs that her emails were protected concerted activity. (See note 7.) This demonstrates the accepted usage of company electronic communications systems by employers and employees for discussion of issues related to working conditions. These were not personal emails.

Recently, the Board affirmed a finding of a violation of Section 8(a)(1) where the employer disciplined employees who used email for protected concerted activity on work time. (*Grand Canyon Education, Inc.*, 362 NLRB No. 13 (2015), *reaffirming*, 359 NLRB No. 164 (2013) [victim of *Noel Canning*].) This was not personal use of the email. It was work and business related. There is no way to escape the conclusion that email use is commonplace during work time, and the use of it for communication about work place issues is protected.

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[26] Many of the emails were forwarded from the company email system. (*Id*. at p. 14.)

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Here again the ALJ made such a finding as to the use of email by VIs:

> Employees use the company email system on a daily basis while at work for communications among themselves. The company email is also use for communications among managers and employees. ALJD p. 3: 16-20

This is consistent with common use of email and electronic communications in today's and tomorrow's workplace.

Of course, the employer has the right to limit communications to ensure productivity and other substantial business needs. Just like it can make sure the VIs respond promptly to any incoming call, it can ensure anyone with an employer communications service or device is not distracted from his or her work task. Purple offered no evidence that email use by employees has interfered with productivity. Just like employers can limit the time workers use to spend at the water cooler, they can limit communications, as long as the limit is non-discriminatory.

VI. THE *REGISTER-GUARD* RULE REGARDING DISCRIMINATION SHOULD BE DISCARDED.

Although the Board declined in to expressly overrule the *Register-Guard* discrimination test (see footnote 13), the Board should do so now. There is no evidence presented on this record that would offer a justification for discriminating against communications with "organizations."[27] Here, it is particularly appropriate since the employer tolerated emails that were anti-union and thus anti-organization.

Moreover, there is no basis to discriminate against communications with "persons." As we know, the term "person" now includes corporations and other entities, including unions. (See *Citizens United v. FCC*, 558 U.S. 310 (2010).) Thus, the rule explicitly prohibits communications with labor organizations, which are persons.

Moreover, the rule allows personal emails unless they are "uninvited email of a personal nature." (See Resp. Ex. 8 and 4.) The rule allows personal emails unless they are "uninvited email of a personal nature." The record thus compels a conclusion that *Register-Guard* must go completely. *Purple Communications I* effectively overruled *Register- Guard*.

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[27] Purple encourages VIs to participate in one outside organization Jt. Ex 1, p. 23.

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A. THE STRONG POLICY REASONS TO ADOPT THE RULES ADVOCATED HEREIN

There are strong policy-based reasons to adopt the rule urged here pursuant to the Board's responsibility "to formulate and adjust national labor policy to conform to the realities of industrial life." (*NLRB v. Yeshiva Univ.*, 444 U.S. 672, 693 (1980).) The Board generally recognized these principles in *Purple Communications I*. But these policies apply equally during work time so long as such communications do not otherwise interfere with productivity or other defined business rules.

First, and foremost, email and other forms of electronic communication are ubiquitous in most all modern workplaces. Other forms of communication systems, including hardware, text messaging, applications, RFID, social media and other forms are everywhere, sometimes in multiple formats. In many workplaces, then, electronic communication has become an important "avenue[] of communication open to [employees] . . . for their right to self-organization." (*LeTourneau Co.*, 54 NLRB at 1260.)

In addition, "[r]apid changes in the dynamics of communication and information transmission are evident, not just in the technology itself, but in what society accepts as proper behavior" regarding the use of email. (*City of Ontario v. Quon*, 560 U.S. 746, 759 (2010).) In particular, "[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency." (*Ibid.*) There is a movement among some employers to encourage employees to "bring their own devices" (BYOD), which poses many issues for employers and employees. But we also concede that there are many employees who do not currently use email, at all, for work. Many who do not have email use may have other forms of employer communication equipment. There are many forms that allow limited communications, sometimes only one way (employer to employee), but sometimes employee to employer, employee to other employee or employee to non-employee. This rapid change is equally illustrated by Purple's website advertising new communications services for its clientele. (See http://www.purple.us/.) Email and related communications, such as text messaging, will evolve and change.

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One federal district court has recently recognized this: "The Court takes judicial notice of the fact that it is a customary practice for employees to use their business emails and computers for both personal as well as business purposes, but merely using a work computer or email address does not implicate the employer's involvement in the employee's personal business, let alone that the employer purposefully directed the activity." (*Farkas v. Rich Coast Corp.*, 2014 WL 550594 (W.D. Pa. Feb. 11, 2014). See also, *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 307 (2010) ["In the modern workplace, for example, occasional, personal use of the Internet is commonplace"]. See also, *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177, 182-83 (Wis. 2010).)

The speed and efficiency of email communication, as well as the ability of many employees to access a work email account from a mobile electronic device or a home computer, makes email communication, if anything, less disruptive than face-to-face communication at the workplace. In addition, unlike the use of a company bulletin board for Section 7-protected communications — where employee non-work use may crowd out the employer's use of its property for work-related communications — normal employee use of a company email system for non-work communications is highly unlikely to interfere with the simultaneous use of that system for work tasks. (*Cf., Intel Corp.*, 71 F.3d at 303–04 [no evidence of email messages slowing or impairing employer's email system even where former employee sent thousands of messages simultaneously]; and *Cal. Inst. of Tech., supra*.) To the extent that certain *forms* of employee use of a company email system potentially could interfere with an employer's use of that system for work purposes — such as the sending of large attachments that might slow the employer's email system or spamming that might create such a distraction as to interfere with employees' use of the email system for work purposes — an employer could lawfully place limits on such forms of use of its system, as long as it does so in a non-discriminatory manner.

Thus, because "[f]lexible, common-sense workplace policies that allow occasional personal use of email are in line with the mainstream of professional practice" (*Schill*, 786 N.W.2d at 196), and because such use does not create additional cost for an employer or interfere with the employer's property rights, the Board's *Register-Guard* rule, permitting an employer to

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lawfully prohibit *all* employee use of email for Section 7 purposes is far out of step with the "realities of industrial life" (*Yeshiva Univ.*, 444 U.S. at 693), and represents an unwarranted restriction on the ability of employees to "effectively . . . communicate with one another regarding self-organization at the jobsite." (*Beth Israel Hosp.*, 437 U.S. at 491.)

The practicalities of the presumption we advocate should be readily apparent.

The employer, such as Purple, can choose to make any electronic communications device available to any given employee or group of employees. It is a managerial decision.[28] There are various communications systems that it can choose from. For example, it can select a voice activated or text messaging system that permits only one way communication or communication with a designated person, such as dispatcher or supervisor. It can control the recipients of email or use of electronic communications. It can preclude all attachments or links. It can limit the length of the email message. So long as there is a clearly stated business purpose and "uniform and consistently enforced controls" that the employer can show "are necessary to maintain production and discipline," the employer has a wide range of tools to control the use of its email or electronic communications systems.

Here, Purple evinces this flexibility. Many employers prohibit use of employer phones for personal use, meaning, again, for communication unrelated to work. Purple, however, allows such use on company phones and employee cell phones so long as each call is limited to 3 minutes. (Jt. Ex. 1, p 29.) It allows use of relay services "to make a personal call, [the employee] is entitled to use relay in the normal course of your business." (Jt. Ex. 1, p 33.)

Employers, furthermore, have the ability to monitor use of these emails in ways that did not apply when the Board formulated its rules, 50 or more years ago.[29] An employer can monitor every aspect of electronic communications. As in many other circumstances where employee use of communication interferes with work, it can take appropriate action. For example, if VIs are

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[28] Subject to any bargaining obligation with a recognized union.

[29] *Mcpc, Inc.*, 360 NLRB No. 39. * 7–8, n.13 (2014) (audit of computer used by employee demonstrated he did have inappropriate access to data). Employers will have to observe federal law which can limit access to email accounts and other electronic media. (*Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 876- 880 (9th Cir. 2002).)

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allowed to read a book, but the FCC requires each call be answered within 120 seconds, Purple can easily monitor each VI to ensure that he or she was available to answer each call promptly when each call appeared. Purple can tell whether the VI was logged into a call, or waiting, and how long before he or she answered the next waiting call. Thus, productivity can easily be measured and enforced. Although these issues are not directly before the Board, they serve to illustrate the practicalities of the rule we propose. The availability of employee cell phones, personal devices, social media sites and personal email does not affect the presumption urged in this brief.

The Supreme Court has clearly held that the availability of alternative means of employee-to-employee communication is not relevant in determining the nature and strength of the Section 7 right. (See *Beth Israel*, 437 U.S. at 504–05; *Babcock & Wilcox*, 351 U.S. at 112–13.) Here, the employees are disbursed among 16 call centers. The inability of some employees to communicate with fellow workers, other than through email, demonstrates the critical nature of this Section 7 right. Thus, availability of other forms of communication is not a relevant issue.[30] The Board so ruled in *Purple Communications*. (See footnote 62.) The employer has made no effort to establish any factual record that there are any other available alternatives. Here, moreover, Purple allows VIs access to their email from their own computers and smart phones. It cannot based on that or establish any reason to require that VI's use only their personal devices for such communication.[31]

VII. THESE PRINCIPLES SHOULD APPLY TO ALL FORMS OF ELECTRONIC COMMUNICATIONS SYSTEMS.

It is not possible to predict all forms of communication systems that will be available and used by employers or employees. In the future, there will be many forms of communication that are only being developed. For example, there has been recent publicity about implanting medical

[30] The Board and the ALJ need not reach the issue of access to email by non-employees. The right of non-employees to communicate, solicit or send attachments is governed by state or federal law. (*Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). See also *Intel Corp.*, 71 F.3d 296, and CAN SPAM, 15 U.S.C. section 7701 *et seq.*)

[31] This is the so-called "Bring Your Own Device" practice in which employers encourage employees to use their own electronic devices for work related purposes.

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devices that will send signals regarding medical history. There are also already available wearable devices that will monitor work activity. Could the employee wear his or her own device in order to monitor his or her own activity to provide information to other employees? Could the employee transmit safety or work performance data to a union concurrently with transmitting it to the employer? Could the employee use his own device to download and email company information that is related to wages, hours and working conditions? These questions will arise in the future. However, the basic statutory right of employees to engage in communication in the workplace established by Section 7 will govern these questions. What is certain is that efficient industry and productive work requires communication. Employers will have to accommodate their need to allow employees to communicate through electronic means with the right of employees to engage in Section 7-protected communications. Nothing in the record suggests Purple cannot do this.

Here, Purple has internet access available to employees. It has a company intranet. Its rule encompasses voice mail and cellular phones. The principles the Board develops will apply to all such electronic communications.

VIII. THE BOARD SHOULD OVERRULE *LUTHERAN HERITAGE VILLAGE-LIVONIA*.

The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an unworkable and unreasonable doctrine to determine when employer maintained rules are unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB 824 (1998). (See also *Ark Las Vegas Rest. Corp.*, 343 NLRB 1281, 1283 (2004) [any ambiguity in a rule which restricts concerted activity can be construed against the employer].)

The Board's application of the *Lutheran Heritage Village-Livonia* rule ignores the basic concept that if some employees can read the language as interfering with Section 7 rights, then there is a violation because some employees have had their rights unlawfully interfered with or restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity allows Purple to restrict the Section 7 rights of those who reasonably read the rule as reaching Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest

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in such activity. They may assert their right to "refrain from such activity." But those who choose to engage in such activity have their conduct chilled if not prohibited. The Board's rule is a form of tyranny of some or a few over the rights of those who want to engage in Section 7 activity.

In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could be conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

(*Lutheran Heritage Village-Livonia*, 343 NLRB at 647.)

This doctrine has created confusion and uncertainty in the application of rules. Moreover, it is an illogical statement. If the "rule could be interpreted that way [to prohibit section 7 activity]," the rule should be unlawful. We are not suggesting that if that "reading is unreasonable" it should violate the Act. Only if the rule can be reasonably read to interfere with Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity, it should be unlawful.

The Board's prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity against the employer. This has been the consistent application in many areas of law, including the Board's application of employer-created rules. After all, the employer has control over what it says, and it can implement language that is not vague or ambiguous. Only the employer benefits from chilling and restricting Section 7 activity.

A worker is not at fault if the employer makes a statement which is ambiguous and could affect or chill Section 7 rights. The employer statement should be construed against the employer. Where there is any reasonable interpretation of the rule that could interfere with Section 7 activity, the rule should be deemed unlawful.

This rule has become one of which the Board ignores the illegal yet reasonable interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has

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turned the law on its head; where there is a reasonable interpretation which a few employees may apply, it makes no difference that most or many of the employees would apply a reasonable interpretation that the rule prohibits Section 7 activity.

The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of employer rules to be created from the employer perspective rather than from the view of a worker. Where the worker could read any reasonable interpretation into the rule that would prohibit Section 7 activity, it is overbroad as to that worker or a group of workers. The fact that some workers might reasonably construe it not to prohibit such Section 7 activity does not invalidate the fact that at least some employees could reasonably read the rule to prohibit Section 7 activity, and thus the rule would chill those activities.

We quote at length the dissent and ask this Board to return to the view of the dissent:

> In *Lafayette Park Hotel*, supra at 825, the Board recognized that determining the lawfulness of an employer's work rules requires balancing competing interests. The Board thus relied upon the Supreme Court's view, as stated in *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945), that the inquiry involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 326 NLRB at 825. While purporting to apply the Board's test in *Lafayette Park Hotel*, the majority loses sight of this fundamental precept. Ignoring the employees' side of the balance, the majority concludes that the rules challenged here are lawful solely because it finds that they are clearly intended to maintain order in the workplace and avoid employer liability. The majority's incomplete analysis belies the objective nature of the appropriate inquiry: "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights."
>
> Our colleagues properly acknowledge that even if a "rule does not explicitly restrict activity protected by Section 7," it will still violate Section 8(a)(1) if—among other, alternative possibilities—"employees would reasonably construe the language to prohibit Section 7 activity." On this point, of course, the established test does not require that the only reasonable interpretation of the rule is that it prohibits Section 7 activity. To the extent that the majority implies otherwise, it errs. Such an approach would permit Section 7 rights to be chilled, as long as an employer's rule could reasonably be read as lawful. This is not how the Board applies Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").

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> The majority asserts that it has considered the employees' side of the balance, in that it has found that the purpose behind the Respondent's rules—to maintain order and protect itself from liability—is so clear that it will be apparent to employees and thus could not reasonably be misunderstood as interfering with Section 7 activity. Although the Respondent's assertedly pure motive in creating such rules may be crystal clear to our colleagues, it may not be as obvious to the Respondent's employees, especially in light of the other unlawful rules maintained by the Respondent. Rather, for reasons explained below, we find that the challenged rules are facially ambiguous. The Board construes such ambiguity against the promulgator. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 299 fn. 8 (1978)

(*Id*. at 650 [footnote omitted].)

The problem is illustrated here, where "INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY" states that "such equipment and access should be used for business purposes only." As we have demonstrated, communications about work related issues is certainly "for business purposes." The same is true of the phrase prohibiting "Sending uninvited email[s] of a personal nature." The emails sent in this case about the decertification were work related, but were they "personal"? These terms are facially ambiguous and contradictory. The *Lutheran Heritage Village-Livonia* rule allows ambiguous rules to pervade the workplace where employers could correct them by making them narrow enough to prohibit only unprotected conduct. Finally, as we know, the term "person" now includes corporations and other entities including unions. (See *Citizens United v. FCC*, 558 U.S. 310 (2010).) Employees may reasonably construe the word "persons," just as the Supreme Court did, to include not only unions but also employees of other employers.

The *Lutheran Heritage Village-Livonia* rule should be discarded.

IX. THE ADMINISTRATIVE LAW JUDGE ERRONEOUSLY REFUSED TO ALLOW THE CHARGING PARTY TO ESTABLISH ADDITIONAL FACTS ON THE RECORD.

The ALJ closed the record and refused to allow the Charging Party to place any more evidence in the record. The Board granted a Special Motion for an Interim Appeal, but denied the Appeal on the Merits, leaving open the issue for Cross-Exceptions. We now argue that point.

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The Board stated in *Purple Communications I*:

> We remand the issue to the judge for him to reopen the record and afford the parties an opportunity to present evidence relevant to the standard we adopt today, and the judge for him to prepare a supplemental decision containing findings of fact and conclusions of law, and a recommended Order, consistent with this Decision and Order.

The remand order specifically states that "the judge shall afford the parties an opportunity to present evidence on the remanded issues."

The Board went further and stated at page 17:

> As stated, however, we will remand this aspect of this case to the administrative law judge for further proceedings consistent with this decision, including allowing the parties to introduce evidence relevant to a determination of lawfulness Respondent's electronic communications policy.

Nothing in these statements suggests the remand was limited to allowing the Respondent to put on evidence only as to whether it has special circumstances to justify its electronic communications policy. The Board established a new standard and contemplated a remand for the parties to make a record.

The Board's ORDER states:

> IT IS FURTHER ORDERED that the judge shall afford the parties an opportunity to present evidence on the remanded issues…

The remand was not "issue" but "issues." The remand was not to allow only the Respondent but to allow the "parties" to present evidence. This Order was quite clear.

The Administrative Law Judge focused upon one sentence at page 17, in which the Board stated: "We will remand this issue to the Judge to allow the Respondent to present evidence of special circumstances justifying restrictions and imposes on employees' use of its email system." Such stray statements are not the remand order. The Board's Order clearly states the remand to the ALJ.

The Board thought that, as a matter of due process, the parties (and not just the Respondent) should be allowed to present evidence based upon its newly established standard for use of email. This is an issue that had been before the Board for close to 20 years in various cases. The Board, in a lengthy opinion, evaluated these issues and remanded to the Judge for the

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taking of additional evidence. It would violate the Charging Party's due process rights to foreclose it from presenting evidence where the Board thought that it was appropriate to allow, in the Administrative Law Judge's view, the Respondent to do so. This was not meant to be a one way street. Due process works both ways.

The Administrative Law Judge erroneously read the Board's decision to remand only for the sole purpose of allowing the Respondent to present evidence of special circumstances. The Board's remand, as noted above, was broader than that. It was clear, particularly from the ORDER provision, that the parties, and not just the Respondent, are allowed to present evidence on the issues. The ALJ is ultimately bound by the ORDER, not a portion of one sentence from the discussion in 17 pages. Federal Rule of Appellate Procedure 41, governing remands, has been similarly interpreted. The remand is governed by the court's remand, not any stray discussion in the court's opinion. This ensures that there is no ambiguity in the court's order and remand.

The Charging Party proposed to present evidence to show that Purple's electronic communications policy is invalid under section 8(a)(1) and 8(a)(3). Among other things, the Charging Party offered to provide evidence as follows:

1. A consistent use of email and electronic communications by the employer on issues related to work concerning wages, hours and working conditions. The employer routinely communicated with video relay interpreters by use of email and other electronic communications regarding wages, hours and working conditions;

2. There will be no interference with or effect on the electronic communications systems by employees use of the email for protected concerted activity or other communication about wages, hours and working conditions;

3. Employees and the employer have consistently used the email system and other electronic communications systems during "working hours" for purposes of communicating about wages, hours and working conditions. The use of electronic communications for protected concerted activity or union activity cannot be limited simply to non-work hours.

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4. The employer has encouraged and condoned use of the email and electronic communications systems during work hours for work related purposes, including communications about wages, hours and working conditions.

5. Video interpreters are not allowed to be interpreting during all work hours. In fact, they are required to stop interpreting for certain portions of every hour as an ergonomic and health and safety issue. As a result, although this time is "work time" because it is paid, there is no work that they have to perform. During this time, they should be allowed to use the email and electronic communications systems.

6. The employer makes available email and electronic communications systems to the interpreters, who use them throughout work time as well as non-work time.

7. There will be no interference with productivity or discipline if the employees use the email and electronic communications systems during work time and non-work time.

8. There are no circumstances that justify any prohibition against the employees from using email or electronic communications during non-work time.

9. Employees have used the company's email and electronic communications systems for communication about work related issues during non-work time with the approval or encouragement of the employer.

These are some of the facts that the Charging Party offered to present. As noted, the Board is very clear to allow remand for both parties to present evidence.

Although the Board noted in a footnote it was not necessary to reach the discrimination issue under *Register-Guard* (See footnote 13), the Charging Party notes that this issue still remains in the case and believes that the above evidence will prove that the employer's application of the communications policy is discriminatory. It wished to make a record, as noted above, about the discriminatory application.[32]

The ALJ has, furthermore, narrowly read the remand regarding the remedy issue. The Board noted that there was no back pay liability or reinstatement obligation. The only remedy, as

[32] Although, as noted above, the record would justify overruling the *Register-Guard* discrimination test.

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the Board noted, is "its remedial obligations [which] will be limited to rescission of the policy and standard notifications to employees." (See p. 17.) As noted above, the remand was broad and allowed both parties to present evidence. The Charging Party proposed to present evidence to establish the standard notifications should include:

1. Email and other electronic communications system posting.

2. Email or electronic communications directly to each video relay interpreter. This will be an appropriate remedy because the employer uses the email to communicate with the employees regarding working conditions.

3. A reading of the notice. This will be an appropriate and standard remedy in this case because an employer routinely reads notices and other information to video interpreters in group meetings.

4. Posting of the notice should be required on the employer's email and electronic communication systems as well as in each of the offices.

5. Employees should be advised of the notice posting because they are routinely advised of notices which they are supposed to read on electronic communication systems. This should apply to the Board Notice.

6. The Notice should be mailed to video relay interpreters who are no longer working for the company.

7. The Notice should be signed to the video relay interpreters.

The ALJ too narrowly read the Board's remand. It is plain that it allows the parties to present evidence. The remand is not, as the ALJ interpreted, limited to the Respondent's choice of whether to present special circumstances. The Charging Party should be allowed to rebut the suggestion that there are any circumstances or any justification to limit the use of email and other forms of electronic communications.

A. REMEDY

1. <u>The Remedy is Inadequate</u>

The remedy in this case should include the following:

1. Intranet postings;

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2. Mailing of the Board Notice to all employees and former employees;

3. Mailing of the Board decision so that the employees will be able to understand the reasons for the Board remedy;

4. Appropriate language in the notice in which the employer acknowledges its unfair labor practice such as:

> We have been found to have maintained unlawful rules restricting the use of employee email for protected concerted activity and union activity. We have agreed to rescind those rules and to allow you to use the email for protected concerted Union activity during work and non-work times so long as it doesn't interfere directly with your job duties at the time;

1. Notice posting for the period of time from when the violation began until the notice is actually posted;

2. The Posting should be nationwide at all facilities;

3. The employer should email, on a regular basis, the notice of the Board Decision to each employee since it uses email system for distribution of employment related matters;

4. Because the employer maintains office meetings, it should be required to read and discuss the notice at office meetings;

5. The employees should be afforded work time to read the Board's Decision and the Notice;

6. The employer should allow 5 hours of time for employees to communicate about Section 7 matters to make up for the time which they have lost for such use by the maintenance of the unlawful rule;

7. Post the Notice on its Website with a link to the Decision on the Board's website; and

8. Notify the Federal Communications Commissioner, which is its principal source of funding of its illegal conduct. Order Purple to reimburse the FCC for any fees it has spent in committing unfair labor practices and defending this litigation.

As to the specific issue of nationwide posting, the record establishes that the handbook applies nationwide. There are references throughout the record to the employee handbook, which demonstrates its applicability to employees who work for Purple inside and outside the state of

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California. (Jt. Ex. 1 at p. 7, 8, 14, 15, 17, 18, 21.) Purple has enforced one or more policies contained within the handbook, including the Electronic Communication Policy, against one or more employees working in Respondent's Denver call center. (Tr. 306–307.) Purple's policy regarding Key Metrics and login rates were applied to employees at all of Respondent's call centers. There is more than enough evidence that this policy is companywide; any other conclusion would be contrary to any normal operation of a business.

X. CONCLUSION

For the reasons suggested above, the Communications Workers of America urges the Board to find that Purple allows the VIs to use email during work time for protected concerted activities by communicating about work related issues. The record establishes such use, and the ALJ found such use. The employer declined to offer any evidence to substantiate any limitation. As a result, there is no business justification to restrict such use during work or non-work times. Purple has not implemented any rule limiting such use. Although it may be possible to implement such a rule limiting the use during work time when VIs are interpreting with a client, it has not done so.[33]

On the basis of these three undisputed facts — employees routinely used company email to communicate with one another during work time; employees had unlimited access to company email on both non-work time and work time, including in break rooms and from home; and no employee was ever disciplined for nonbusiness use of company email — the Board should draw the reasonable inference that employee use of Purple Communications' email system was routine and tolerated by the company during work and non-work times.

Employees can use employer email systems, including other electronic communications systems, such as text messaging, voicemail, internet access and intranet for protected concerted activity concerning mutual aid or protection or Union activity unless the employer adopts a clear rule limiting the email system to a specific business purpose and strictly enforces that rule, which

[33] And, as noted above, the Board does not need to address the issue of whether this circumstance would constitute special circumstances since Purple has not made this assertion. Nor has Purple adopted any rule defining when email and electronic communications devices cannot be used.

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Purple has not done. Nor has Purple prohibited all access to its email system. Here, the employees have access to email during work time. Purple cannot foreclose them from accessing email during non-work time and, in this case, during work time. This reflects the modern day use of electronic communication systems as found by the Board, including the dissents, in *Purple Communication I*. It protects and properly balances the rights of employers and employees.

Dated: June 23, 2015

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/s/ David A. Rosenfeld
By: DAVID A. ROSENFELD

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On June 23, 2015, I served the following documents in the manner described below:

CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jwatkinson@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 23, 2015, at Alameda, California.

/s/ Jennifer Watkinson
Jennifer Watkinson

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